



12 May 2015

Consumer Policy Framework Unit
Small Business Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: AustralianConsumerLaw@treasury.gov.au

Dear Sir or Madam

Extending unfair contract term protections to small businesses

Origin Energy Limited (**Origin**) welcomes the opportunity to comment on the exposure draft legislation to extend the unfair contract term protections to small businesses, released for comment on 28 April 2015 (**Exposure Draft**).

Origin has a number of concerns with the Exposure Draft and makes the following comments for consideration:

- the concept of “upfront price payable” is unworkable where it is tied to a monetary threshold and intended to apply to energy supply contracts;
- if a workable approach to a monetary threshold can be devised, the proposed monetary thresholds are excessively high; and
- the electricity and natural gas retail markets already have in place a workable definition of “Small Customer” which includes small business customers which could be used in order to classify small business customers in the electricity and natural gas sectors.

Unworkable concept of “upfront price payable”

As you are aware, the definition of “upfront price” was included in section 26(2) of Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* (the *Australian Consumer Law (ACL)*) as part of a suite of amendments introducing an unfair terms regime for consumers. The term was used to define what was excluded from the application of the unfair terms regime.

Under the Exposure Draft, this definition is proposed to apply to a monetary threshold and define the scope of contract that will be subject to the unfair terms regime for small businesses. Specifically, the regime will apply:

- if the upfront price payable under the contract does not exceed \$100,000; or
- where the contract has duration of more than 12 months, if the upfront price payable under the contract does not exceed \$250,000.

Origin considers that the concept of “upfront price payable” when used in conjunction with a monetary threshold is unworkable in the context of contracts for the retail supply of electricity and natural gas, since these contracts do not have an upfront price and the price is always contingent on the customer’s consumption. The only exception to this is distributor or a connection fee that a customer may occur in certain scenarios (such as if they move premise). These amounts are once off fees, form only a small portion of the value of the contract and are arguably not “*consideration that is provided for the supply under the contract*” (namely electricity or natural gas) but instead tend to be pass-

through charges from distributors. In the case of LPG, while some contracts have an upfront price payable for a certain number of LPG cylinders taken up by the customer on day one, over the term of the contract the customer will order replacements or refills for those cylinders which will add to the total price payable.

As an alternative, Origin proposes below its recommendation to rely on the existing concept of “Small Customer” for electricity and natural gas retail supply contracts. For all other small business contracts, Origin would support considering measures that have been used over time in other areas of the CCA, for example:

- the “price of the services” - used to define when a service is provided to a “consumer” in section 4 of the CCA; or
- the “value of the transaction” - used as the threshold for unconscionable conduct in section 51AB of the *Trade Practices Act (Cth) 1974*.

Monetary thresholds excessively high

Even if Origin could address the workability issue identified above in respect of the “upfront price” payable concept (by potentially adopting a broader concept of price or value of the contract), Origin considers that the monetary thresholds proposed in the Exposure Draft are extremely high and are therefore likely to afford protections to businesses that would not otherwise consider themselves small business.

For example, in relation to solar purchase and installation contracts, only the very largest commercial purchases and installations are priced at \$100,000 or above and to date Origin has never contracted with a small business for a system valued anywhere near \$100,000.

Existing definition of “Small Customer” under the *National Energy Customer Framework (“NECF”)*

At present, the electricity and natural gas retail markets in most Australian States and Territories differentiate between “Small Customers” and non-Small Customers (Western Australia and Northern Territory operate under separate regimes and as Origin does not retail in these jurisdictions, it is unable to comment). Small Customers on market contracts are afforded greater protections than non-Small Customers. These protections include cooling off provisions, minimum billing requirements and pre-contractual disclosure of certain information. In respect of the contract itself, NECF also prescribes that market contracts with Small Customers include:

- all tariffs and charges payable by the customer;
- a mechanism to give notice of any variation to those tariffs and charges;
- a complaints and dispute resolution process; and
- a limit on liability and immunities.

NECF also provides for minimum terms and conditions that must be offered to Small Customers (including small business) as part of a standing offer contract.

Critically, Small Customers are categorised based on their annual energy consumption. Consumption amounts vary between states but in general “Small Customers” are all residential customers and those customers generally understood to be small business.

Origin considers that in light of this existing regime, it is unnecessary to introduce an additional layer of regulation. Alternatively, if the unfair contracts term regime is to be extended to small businesses for electricity and natural gas contracts, then the “Small

Customer” classification should be applied to determine the contracts to which the unfair terms regime applies.

Should you have any questions or wish to discuss this information further, please contact Katrina Gowans on (03) 8627 9111 or katrina.gowans@originenergy.com.au.

Yours sincerely,

A handwritten signature in blue ink that reads "M Gallagher". The signature is written in a cursive, flowing style.

Megan Gallagher
Head of Legal - Retail